**Fair Play NC v3**

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# \*\*CASE\*\*

## CASE [1/3]

**I negate and value justice because the resolution is a question of why individuals deserve punishment.**

#### Part 1 is INTERPRETATIONS:

#### The question of the resolution is WHY we punish, not what kind of punishment we enforce. Retribution does not specify any particular set of policies*.*

Gerard V. Bradley 2003. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT Harvard Journal of Law and Public Policy; Fall 2003; 27, 1; ProQuest Research Library. DT.

Fourth, retribution is not the source of criminal law; it is simply a theory of punishment. Notably, the content of criminal law is rooted in the whole ensemble of conditions that comprise the common good of political society. Some of the most obvious and important of these conditions include respect for basis human rights, such as the rights¶ not to be intentionally killed or physically harmed by anyone.¶

Finally, retribution tells us little about what a particular defendant's sentence ought to be, or even how to define a range of acceptable punishments for a given crime. Legislative and judicial authorities necessarily (and rightly) make the important choices in sentencing about fairness and proportionality, governed by a sense of the sentence's aptness to the crime and its coherent position within the global pattern of possible sentences. In other words, while moral reflection can tell us that assault and theft should be treated as crimes, it cannot stipulate which privations should be imposed for those crimes. As such, the sentence for a specific offender is not directly deducible from any single factor; it necessarily involves a decision guided, but not dictated, by reason.

#### Next, the resolution is a question of government duties because:

1. **The resolution demands a comparison of justifications for punishment within the judicial branch of a political system.**
2. **Individuals don’t apply paradigms of punishment as vigilantes; rather, different approaches are developed within the legal system itself.**
3. **Even individual accounts would concede that the evaluation is still one of government action, so we still have to take into account the obligations of the actor.**

## CASE [2/3]

#### PART 2 is the CASE:

#### Society is meant to structure cooperation in ways that guide people to treat others fairly. Although some people would probably act in reasonable ways even without a legal system, laws are procedurally necessary for the existence of the state.

Gerard V. Bradley 2003. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT Harvard Journal of Law and Public Policy; Fall 2003; 27, 1; ProQuest Research Library. DT.

In the absence of any established political order, people[s’] would do whatever they pleased. Yet their choices would not necessarily [create a] render society the uncontrollably selfish state of nature anticipated by Hobbes.6 Even absent political order, [S]ome people would likely act reasonably, maybe even altruistically, and seek cooperation to achieve common benefit. But there would be no means through which to structure that cooperation; each person would have to exercise personal judgment about the appropriate way to cooperate with others. Political society, by contrast, provides [a solution whereby] an authoritative scheme for structuring cooperation, a scheme which thereby excludes all reasonable alternatives. Under such a system, individuals naturally accept these restrictions on their freedom to act on their own personal judgments about successful cooperation.

The following [For] example, though simple, captures this concept well. Neither driving on the left side of the road nor on the right is immoral. Either could easily be chosen as the rule of the road.7 Both, however, cannot be chosen without disastrous consequences. [and neither can] Refraining from all authoritative choice would be as catastrophic. After determining that driving shall occur on the right side of the road, political authority may then appropriately penalize those who continue to drive on the left. Legal norms such as this one guide people by specifying the exact form that fair cooperation with others should take; they make general moral obligations [that] concrete and explicit. "Drive in an orderly, consideration fashion" therefore includes an obligation to yield to cars and pedestrians in the right of way. Further, the law tells people how to determine who has the right of way under certain conditions. In short, specific legal norms tell people how to treat others fairly.

#### Any political system must therefore require individuals to accept restrictions on liberty. It follows that crimes are wrong not because any particular individual is harmed but because the criminal acts unfairly towards society as a whole.

Gerard V. Bradley 2003. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT Harvard Journal of Law and Public Policy; Fall 2003; 27, 1; ProQuest Research Library. DT.

An important conclusion from these premises is that justice requires individuals to accept the pattern of liberty and restraint specified by political authorities. By accepting the established apparatus of political society and by observing its requirements, legal¶ liberty for all is equalized. The central wrong in crime, therefore, is¶ not that a criminal causes harm to a specific individual, but that the¶ criminal unfairly usurps liberty to pursue his own interests and plans¶ in a manner contrary to the common boundaries delineated by the¶ law. (Alternately, where the crime is one of negligence, the offender¶ demonstrates that he is unwilling to make the requisite effort to stay¶ within the legally or morally required pattern of action or restraint.)¶ From this perspective, it is clear that [such that] the entire community-save the¶ criminal-is victimized by crime. The criminal's act of usurpation is¶ equally unfair to everyone else, in that he has gained an undue¶ advantage over those who remain inside the [law] legally required pattern 8¶ of restraint.

## CASE [3/3]

#### Thus, the purpose of punishment should be to deprive the criminal of the unfair advantage he or she has gained.

Gerard V. Bradley 2003. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT Harvard Journal of Law and Public Policy; Fall 2003; 27, 1; ProQuest Research Library. DT.

Depriving the criminal of this ill-gotten advantage is therefore the¶ central focus of punishment. Since that advantage primarily consists of a wrongful exercise of freedom of choice and action, the most appropriate means to restore order is to deprive the criminal of that freedom. Punishment may include sensory deprivation, even transient pain, which will likely be experienced by the criminal as "suffering." Hart notwithstanding, however, the essence of punishment is to restrict a criminal's will by depriving him of the right to be the sole author of his own actions. The goal of punishment, in short, is the undoing of the criminal's bold and unjust assertion of his own will. Punishment assures society both that crime does not pay and that observing the law is important; by doing so, it restores fundamental fairness and equality.

#### Only retribution meets because it ties punishment to guilt as opposed to the needs of the criminal or other societal benefits.

Gerard V. Bradley 2003. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT Harvard Journal of Law and Public Policy; Fall 2003; 27, 1; ProQuest Research Library. DT.

In fact, all alternative aims of punishment other than retribution swing blithely free of specific anti-social acts by the condemned; the ends can and often are served by "punishing" the innocent. The utilitarian concerns of tranquility, for example, may be served as well or better by the sacrifice of innocents. Further, if we consider rehabilitation in either its therapeutic or moral sense, one can scarcely argue that the law's ministrations must be limited only to those justly convicted of a crime. Some people need moral or psychological help, quite apart from any crim[e]inal misbehavior. In all these perspectives, therefore, [so under rehabilitation] the line between guilt and innocence can be traversed precisely in pursuit of the state objectives. That line will therefore sometimes seem [is] an arbitrary barrier, which only the scrupulous or feckless dare not cross. Conversely, the goal of retribution cannot be obtained by imposing punishment on the innocent. Punishing someone who has committed no offense is impossible. It is not that a certain group of people cannot err [for] simply because they view retribution as the only moral justification for punishment. In fact, they might act immorally and "punish" the innocent. But they cannot knowingly punish the¶ innocent, for if a given person has not distorted equilibrium by committing a criminal act, any attempts to restore what has not been disrupted are futile.

#### Thus, retribution has to be valued above rehabilitation because only retribution bases punishment on the unfairness of the criminal’s action.

#### *[Against policy-based ACs]. I do not take a stance on whether any particular punishment is justified in any individual instance. My argument is just that whatever punishment is imposed may only be imposed on someone who is guilty and that it be imposed because the guilty has acted unfairly towards other members of society, so it is consistent with any policies advocated by the aff. It’s just a side constraint on the aff advocacy.*

# \*\*ADD-ONS\*\*

## DRUGS

**This still applies to drugs:**

#### Drugs increase the risk of committing other crimes as per the AC evidence so it still endangers other members of society.

#### Society has outlawed drug use so that is the agreed-upon norm. When people break this law, they still advantage themselves since no one is able to use drugs.

#### Even if they are not culpable, the original decision to do drugs was rationally chosen so people should still be blamed for drug crimes.

#### Even drug crimes are moral wrongs. Garvey:

Garvey, Stephen P. "The Practice of Restorative Justice: Restorative Justice, Punishment, and Atonement.” 2003 Utah Law Review #303. Symposium on Restorative Justice. Stephen Garvey is Associate Dean of Academic Affairs and Professor of Law at Cornell Law School. B.A., Colgate, 1987; M.Phil., Oxford, 1989; J.D., Yale, 1992.

But when [someone commits a crime] my car is stolen, my house burned down, or my person assaulted through the intentional or reckless action of another, I suffer more than just material harm. Someone who engages in such conduct [crime] says something about his value or worth compared to mine. He says, in effect: "I'm better than you. Your rights are subordinate and secondary to my interests, and I'm free to run roughshod over them as I wish." Crimes therefore convey a message of insult or contempt for their victims and criminal wrongdoers thus display an excessive pride or hubris in themselves. This expressive or moral injury is what constitutes the wrong of a crime, and the wrong of a crime is what makes it a crime.n15 We tend by default to think of the "victim" of a crime as the identifiable person, assuming one exists, who directly suffers the moral and material injury of the crime. But insofar as those who form the relevant community of which the victim is a member identify with the victim and with one another, and thus constitute a community in an appropriately deep sense, those community members can also be understood as victims. Similarly, when the crime involves no identifiable victim, but consists, for example, in conduct that risks causing harm to another, the offender shows contempt, not so much for anyone in particular, but for the law itself, which forbids such conduct. While the rest of us play by the rules, the offender behaves as if he is above them, free to do as he wishes.n16 In short, a crime can produce two very different kinds of injuries. All crimes properly so-called produce moral injury. All crimes, in other words, do wrong. Other crimes produce material injury as well. Thus all crimes do wrong, and some crimes also cause harm.

## SOCIAL/ECONOMIC CONDITIONS

#### Even if the resolution is a question of particular policies, retributivism can still take into account social and economic conditions. I solve.

Dan Markel 2009. “EXECUTING RETRIBUTIVISM: PANETTI AND THE FUTURE OF THE EIGHTH AMENDMENT.” Northwestern University Law Review. Vol. 103, No. 3. [D’Alemberte Professor of Law, Florida State University; A.B., Harvard College; M.Phil., University of Cambridge; J.D., Harvard Law School]. DT.

There are other reasons for caution that warrant consideration by retributivists. First, the death ¶ penalty is frequently imposed on a class of [For] offenders whose socio-economic backgrounds and personal histories often reveal a collective failure to ensure that each child is given a fair shot at securing the basic goods that enable a life well lived.121 On this view, forbearing from a [severe] penalty as severe ¶ as death is consistent with the recognition that our society has often abandoned our shared obligations to those who ended up enmeshed in our ¶ criminal justice system. This recognition need not concede that the offender lacks responsibility for his crime [but it does, for example] in order to highlight our own tooeager acquiescence to urgent criminogenic social conditions. ¶ Second, the retributivist social planner cannot disclaim responsibility ¶ for the harms caused to its state’s executioners. Many of these executioners, and the teams that assist them, suffer from psychological traumas and ¶ associated medical difficulties.122 That problem, coupled with the fact that ¶ many executions are botched,123 counsels restraint. ¶ For the foreseeable future, these contingent criticisms of the death penalty provide a justification for substantial skepticism about the use of capital ¶ punishment on retributivist grounds. Arguably, however, these criticisms ¶ lose their force over time as the administration of justice is rationalized and ¶ improved both inside and outside the domains of criminal law.124 The interesting question, then, is what happens if these practical problems were to ¶ disappear? Are there any categorical objections to the death penalty from a ¶ retributive institutional standpoint? For the reasons next articulated, the answer would appear to be yes.

## MORAL EDUCATION/NORMS

#### Retributive punishment specifically allows the offender to internalize moral norms.

Dan Markel 2009. “EXECUTING RETRIBUTIVISM: PANETTI AND THE FUTURE OF THE EIGHTH AMENDMENT.” Northwestern University Law Review. Vol. 103, No. 3. [D’Alemberte Professor of Law, Florida State University; A.B., Harvard College; M.Phil., University of Cambridge; J.D., Harvard Law School]. DT.

Additionally, embedded in the account furnished so far is an intent requirement on the part of the state’s punishing agents. To insist only on the offender’s perception of his defeat, to the exclusion of the potential internalization of correct values that the confrontation encourages, would stand ¶ in tension with our first interest: affirming our recognition of each other as ¶ autonomous moral agents capable of responsible decisionmaking. In order ¶ to achieve this vision in the concrete practice of punishment, it is crucial ¶ that [punishment] the denial of the offender’s false value claims is carried out in a way ¶ that is conducive to the internalization of the values that the retributive encounter is meant to uphold. The retributive punishment need not guarantee ¶ the defendant’s internalization of those values, but it should proceed with ¶ the desire for that result, and the state ought not take measures that, in the ¶ course of punishment, directly preclude it. At bottom, the state must strive ¶ for a punishment that not only denies the offender’s claim of superiority, ¶ but also invites his transformation.103 To borrow the philosopher Robert Nozick’s memorable and apt phrase, “[t]he hope is that delivering the message will change the person so that he will realize he did wrong, then start ¶ doing things because they are right.”104

#### Rehabilitation isn’t about the benefit to the offender – it only cares about societal good overall.

Dan Markel 2009. “EXECUTING RETRIBUTIVISM: PANETTI AND THE FUTURE OF THE EIGHTH AMENDMENT.” Northwestern University Law Review. Vol. 103, No. 3. [D’Alemberte Professor of Law, Florida State University; A.B., Harvard College; M.Phil., University of Cambridge; J.D., Harvard Law School]. DT

In a society where resources for criminal justice are always balanced among competing attractive social projects and political duties, one can see why the person who has not violated a criminal law has a stronger claim to those scarce social resources than someone who has violated that public trust. Of ¶ ¶ course, in considering prisoner reentry to society, the polity may reasonably decide that investing in the ¶ ¶ skills of offenders is a worthwhile endeavor to reduce the social cost of recidivism and to undertake a ¶ ¶ form of democratic self-defense and social self-protection. That decision, however, is made less for the benefit of the offender than it is for the good of society.

# \*\*NR FRONTLINES\*\*

## FRAMEWORK INTERACTIONS

### INTERACTION: UTIL

#### Util fails to create consistent norms for a government since institutional design requires that rules be based on general principles rather the contingent factors that change constantly. The NC meets institutional design since it creates a framework for mutual cooperation, so it’s the only one with a link to government duties.

1. **A system that punishes culpable offenders is necessary for any system that claims credibility.**

**Robinson:** Robinson, Paul H. (Professor of Law, Northwestern University School of Law) and John M. Darley (Dorman T. Warren Professor of Psychology, Princeton University). “The Utility of Desert.” Northwestern University Law Review, Vol. 91, No. 2. 1997.

Our central point is this: The criminal law’s power in nurturing and communicating societal norms and its power to have people defer to it in unanalyzed cases is directly proportional to have people defer to it in unanalyzed cases is directly proportional to criminal law’s moral credibility. If criminalization or conviction (or decriminalization or refusal to convict) is to have an effect in the norm-nurturing process, it will be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation, and for decriminalizing and not punishing that, which does not. **If,** instead, **the** criminal **law**’s reputation **is** one **simply** of **a collection of rules, which do not** necessarily **reflect** the community’s **perceptions of moral blameworthiness**, then **there would be little reason to expect the** criminal **law to be relevant** **to** the societal debate over **what is** and is not **condemnable and** little reason **to defer to it as a moral authority**. What then are the requirements for a criminal law system to gain this credibility? How can this credibility be lost? Enhancing the criminal law’s moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is doing justice. Therefore, the most important reforms for establishing the criminal law’s moral credibility may be those that concern the rules by which criminal liability and punishment are distributed. **The criminal law must earn a reputation for** (1) **punishing those who deserve it** under rules perceived as just, (2) [and] protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less. Thus, for example, the criminal law ought to maintain a viable insanity defense that excuses those who are perceived as not responsible for their offense, ought to avoid the use of strict liability (imposing liability in the absence of a culpable state of mind), and ought to limit the use of non-exculpatory defenses. In other words, it ought to adopt rules that distribute liability and punishment according to desert, even if a non-desert distribution appears in the short-run to offer the possibility of reducing crime. The point is that **every deviation** from a desert distribution **can** incrementally **undercut the criminal law’s moral credibility, which** in turn **can undercut its ability** to help **in the creation and internalization of norms and its power to gain compliance by its moral authority**.Thus, contrary to the apparent assumptions of past utilitarian debates, such deviations from desert are not cost free, and their cost must be included in the calculation when determining which distribution of liability will most effectively reduce crime.

#### Util can never consistently punish since the punishment is dependent on what creates the best consequences, so it lacks normative force that is necessary for a system to function.

### INTERACTION: AUTONOMY

**Desert allows people to make their own life decisions because their treatment is in their own hands.**

James Rachels. [“Punishment and Desert” *Ethics in Practice 1997.* Pp 470-479] AT

First, acknowledging deserts is a way of grant[s]ing people the power to determine their own fortunes. Because we live together in mutually cooperative societies, how each of us fares depends not only on what we do but on what others do as well. If we are to flourish, we need to obtain their good treatment. A system of understandings in which desert is acknowledged gives us a way of doing that. Thus, if you want to be promoted, you may earn it by working hard at your job; and if you want others to treat you decently, you can treatthem [others] decently. Absent this, what are we to do?  We might imagine a system in which the only way for a person to ensure good treatment by others is somehow to coerce that treatment from them—Worker might try threatening his employer.  Or we might imagine that good treatment always comes as [or from] charity—Worker might simply hope the employer will be nice to him.  But the practice of acknowledging deserts is different.  The practice of acknowledging deserts gives people control over whether others will treat them well [because] or badly, by saying to them:  if you behave well, you will be entitled to good treatment from others because you will have [can] earned it[good treatment]. Without this control people would be in an important sense impotent, less able to affect how others will treat them and dependent on coercion or charity for any good treatment they might receive.

**Thus, only a system that restores equilibrium on the basis of law-breaking can respect individual autonomy because it first connects peoples’ willful behavior to state action. [0:25]**

### INTERACTION: DEMOCRACY/POLLS

#### Making decisions based on the will of the people is infinitely regressive, and the only way to escape it is to have basic constraints on the structure of political institutions.

Wilfried Hinsch 2011. “Ideal Justice and Rational Dissent: A Critique of Amartya Sen's The Idea of Justice.” *Analyse & Kritik* 02/2011. Lucius & Lucius, Stuttgart. Pp. 371-386. [Professor of Practical Philosophy at RWTH Aachen University]. DT.

Nonetheless, Proceduralism and majority voting cannot be the last word. Not every majority vote produces results that we consider to be just. Think about democratic majorities grossly infringing the right to free political speech or religious liberty. Moreover, it is a question of substantive justice to specify the conditions under which voting procedures do result in just collective decisions. It is also, for that matter, a question of substantive justice, why we should prefer a democratic procedure over others. If literally all contested questions of justice had to be decided by voting, we would be caught in an infinite regress. We had to have a vote, about how to have a vote, about how to have a vote ... about whether a particular institution, norm, or action is just or not. If there is to be such a thing as a just voting procedure, not all controversial questions of justice and, in particular, not those questions concerning the justice of collective decision making can be decided by voting. Every procedure presupposes a substantive understanding of its procedural adequacy, if we want to understand it as a procedure that generates just or legitimate results.

Sufficiently complete theories of justice for the institutional basic structure of a society, therefore, have a part dealing with political justice that specifies the conditions under which collective decision-making may generate just or legitimate norms and policies. In liberal democracies these conditions will fall under either of two headings which correspond to the familiar distinction be- tween basic political and liberal rights. The first type of conditions specifies the procedural requirements of just decision-making in a democracy (freedom of speech and association, equal voting rights). The second type of conditions defines a sphere of individual liberty that even procedurally correct democratic decisions cannot violate without loosing their legitimacy (religious liberty, [and the] rule of law, privacy rights). In this way, any sufficiently complete theory of justice for the basic structure contains the normative and procedural means to deal with disagreement, be it disagreement about justice or about other issues of social relevance.

#### This means the NC is a side-constraint on poll-based or majority-wins evaluations because it concerns the structure of basic institutions like the criminal justice system, so it comes prior to evaluations about decisions within those institutions.

## FL: DEFINITIONS

### FAIR PLAY IS DEFINITELY RETRIBUTIVE

Göran Duus-Otterström. “Fair Play Retributivism and the Problem of Punishment”. Research proposal backed by Swedish Research Council. [Research Fellow @ University of Warwick. PhD.] Can be found at http://www.pol.gu.se/english/personnel/faculty/duus-otterstrom/. DT.

FPR [Fair Play Retributivism] can be defined as [is] the view that punishment is justified on account of it being required to promote fairness in a society. The starting point is that offenders violate the social contract that underpins society. They choose to violate the mutually advantageous rules that bind us all, thus enjoying the benefits of the rules without accepting their costs. In that sense they gain an unfair advantage over the law-abiding. Fairness then requires that the offender be punished, thus restoring the fundamental “legal equality” of society. This view is distinctively retributivist in that it justifies punishment on backward-looking grounds. Punishment is justified simply because it is required to remove the already acquired unfair advantage of the offender. Moreover, proportionality is entailed by FPR as greater punishment is reserved for greater unfairness. Yet FPR is not dependent on the seemingly mysterious or vengeful “bite back” impulses that intrinsic good retributivism seems to rely on (Mackie 1982). It is dependent on the value of fairness, the fundamental commitment to which is not mysterious. For example, we often support policies that improve equality of opportunity among children simply because it is fair, irrespective of further consequences. If punishment could be portrayed as a matter of fairness, much would be gained in terms of retributivism’s plausibility. This is the promise held out by FPR.

### A2 NOT A MORAL THEORY

#### Fair play theory can operate without a specific moral theory.

Matravers:

[Matt. Political and Legal Philosophy, University of York. Justice and Punishment: The Rationale of Coercion. Oxford University Press. 2000]

This account of punishment can stand apart from the justification of the distributive scheme which it is the function of punishment to restore. For although if there is to be a moral justification for punishment in the idea of restoring some distribution of benefits and burdens it must be the case that the pattern of distribution to be restored is just, what defines such a distribution is not a question that fair play theory need address. Indeed, if it is to retain its character as a justification of punishment based on Hart's simple idea it must not do so. This is important because fair play theory essentially holds that given a just society it can justify punishment as a second, independent, stage of moral theorizing. That is, the derivation of just norms and rules of co-operation (and their legal analogue, laws) is a different matter from the derivation of just punishment.

#### The question of what makes a just society (the moral theory) is separate from the justice system and punishment because the justification for why we can justly punish is the same regardless of the ethical theory that justifies laws.

## FL: DEBATERS’ OBJECTIONS

### A2 AFF PUNISHES TOO

#### *[Short]:* Extend the topical interpretation – retribution punishes the criminal based on the action, rather than to achieve and end. Saying the aff punishes too concedes the reason we ought to punish is retributive, so that’s enough to negate since the neg burden is to justify a paradigm of punishment.

#### *[Long]:*

#### The criminal justice system entails both retribution and rehabilitation, so even if affirming still entails some sort of punishment, you would still negate because that argument concedes that the reason we rehabilitate is for a retributivist aim, i.e. to punish. That means retribution is valued above rehabilitation because the goal is retribution.

#### This is irrelevant. My argument is that the reason we punish is independent of good outcomes because good practices (such as benefits from rehabilitation) would only be considered once the retributive principle is met, so the fact that we do the same thing in both worlds doesn’t affect whether we value retribution.

#### In a world where rehab has 0 efficacy we can still justify punishing people but the opposite isn’t true – if rehab is effective, we wouldn’t coercively rehabilitate innocent people, so the retributive principle based on desert matters more than the rehabilitative principle.

#### This would imply that the aff is nonunique too – there’s rehab and punishment in both worlds.

### A2 NO INITIAL EQUILIBRIUM/RACISM

#### A2 No Initial Equilibrium

1. **My argument is specific to criminal law benefits and burdens, rather than absolute socioeconomic equality. We ought to impose burdens onto some because they receive the same nonintervention rights from the law – so even if certain minorities are treated worse by the law, since they all continue to receive benefits they must bear burdens.**
2. **If there’s no initial equilibrium, some people might be less culpable than others for their actions, but that concedes retribution because it uses *desert* for crime as the relevant consideration, not the benefits that result from punishment.**
3. **The existence of racism doesn’t mean marginalized groups should be allowed to take any action and not face any consequences. Racist laws should be changed but that doesn’t mean we can sanction unlimited violations of the law in a vigilante fashion. Violating the law is still unfair to other members of society even if not everyone bears equal burdens. The burden is to follow the law as a whole, not submit oneself to particular laws.**

**A2 “The oppressed don’t benefit so they don’t have to accept burdens”**

1. **Yes they do: living in a country means people accept the nonintervention benefits from criminal law since they aren’t killed or robbed indiscriminately – so they must accept burdens. Obviously some people receive more benefits – for instance, married people get tax breaks – but because we all receive similar kinds of benefits from the laws, we should be punished for violations.**
2. **The NC is not about proportionality: as a second-order moral theory, the NC speaks to why we ought to follow laws, but not what the specific content of those laws would be. Society can determine the exact levels of punishment, but we still punish for retributive reasons.**
3. **Marginalized groups are better off within a flawed legal system than in a world with no legal system at all. The criminal justice system can only function in a world where people are held accountable for free riding on others’ obedience to the law. Absent such a system, stronger groups would always have an even more pronounced ability to gang up on the marginalized because there wouldn’t be any enforcement at all of the rights of the minority.**

### A2 REHAB RESTORES EQUILIBRIUM BETTER

#### This argument is nonsensical under my definitions because rehab is not a policy but a paradigm by which we punish. We can *both* have the same policies, my argument is that the reason we restore equilibrium is not to make things better in society as a whole, but rather to force the offender to bear the burden and not receive the benefit because the offender was free riding on others’ cooperation, which is a retributive principle. It is not about the *effectiveness* of restoring equilibrium.

### A2 PUNISHMENT DOESN’T UNDO THE CRIME

#### The equilibrium is not between the offender and the victim, it’s between the offender and the rest of society. Obviously the crime can’t be undone, but punishment forces the offender to bear a burden and relinquish the benefits of living freely in society.

### A2 (CULPABILITY) RESOLUTION ASSUMES GUILT

#### *[Short]:* Fair play only deals with whether the action was committed, not the mental states – this is since the crime would violate mutual restrictions regardless.

#### *[Long]:* This argument is nonsensical. My argument is that being *guilty* is a *reason* to be *punished* *in some way* independently of other considerations, which is a retributive justification. Obviously the resolution is about punishment, but it asks us *why* we punish, not *how*. The limiting principle argument doesn’t rely on what is going on per the resolution. It just says rehab doesn’t punish because the offender is guilty, which is bad because the fundamental principle of the CJS should be to punish for guilt. His argument just concedes that the NC is true.

### A2 “MY THEORY IS FIRST-ORDER TOO”

#### Congratulations. It’s sufficient to negate my proving we ought to be retributive when we apply any punishment to an offender. I don’t have to prove what punishment to use or that the law initially is just. It’s still true that we should punish people in *some* way for committing a crime.

### A2 WOULDN'T HAPPEN IN THE REAL WORLD?

#### This is nonunique because I don’t fiat that anything happens. The debate is just about *why* we apply punishment, not what punishment we apply. When giving a prison sentence, my argument is that we should do it for retributive reasons, whereas the aff’s argument is that we should do it for rehabilitative reasons. The application is still the same.

### A2 COUNTERINTUITIVE

#### Fair play is intuitive.

Joanne Lau. “The State is Not a Radio Station: Reciprocity, Presumptive Benefit and Political Obligation.” Northwestern Society for Ethical Theory and Political Philosophy. 4th Annual Conference. 2010. [Teaches at the School of Philosophy, Australian National University]. DT.

There is evidence that we have an inbuilt or intuitive sense of fairness, which the theory of fair play¶ ¶ seems to accord with. See, for example, [in] the results of the ultimatum game in experimental economics.¶ ¶ In that game, there are two players, one of which has a sum of money. That player proposes how to¶ ¶ divide the sum between them, and the second player can either accept or reject this proposal. If the¶ ¶ second player rejects the first player’s proposal, then neither player receives anything. If the second¶ ¶ player accepts it, the money is divided according to the proposal. Although one would think that the¶ ¶ ‘rational’ thing to do, on a real net cost, would be for the responder to accept any offer that pays more¶ ¶ than nothing, evidence from experimental economics has shown that respondents playing this game¶ ¶ typically refuse anything below 20% of the original sum, suggesting that people tend to have an inbuilt¶ ¶ sense of fairness: if a deal is seen as being unfair, the responders will punish the proposers in the only¶ ¶ way that they can. They will refuse to accept the deal, resulting in no money for either party. This¶ ¶ explains why a 90-10 division between two players would not ceteris paribus be considered “fair”¶ ¶ while a 50-50 (or even 60-40) one would be: Camerer, C. F. and Thaler R. H.,¶ ¶ “Anomalies: ultimatums, dictators and manners”, Journal of Economic Perspectives, 9 (2: Spring),¶ ¶ 1995, pp. 209-19.

## FL: ACTUAL OBJECTIONS IN THE LITERATURE

### A2 FALSE EQUIVALENCE OBJECTION

#### My claim is not that every crime is *only* wrong because it’s unfair, just that the common wrong element across all crimes is at *least* that they are unfair.

Matt Stichter 2010. “Rescuing Fair-Play as a Justification for Punishment.” Res Publica (2010) 16:73–81. [Department of Philosophy, Washington State University]. DT.

While both murder and tax evasion (but not betraying a friend) are thought to deserve legal punishment, they are clearly wrong for different reasons. But if there’s no common element to these two crimes, then perhaps we’re mistaken to think that they both deserve punishment. As pointed out in the false-equivalence objection, for punishment to be an appropriate response to any crime, all crimes must have something in common that makes them deserving of punishment. There is, however, a common element, since Duff points out that not every act that is inherently wrong is also against the law. We need rules to identify which wrongs will count as public or criminal wrongs, otherwise it’s unclear why murder deserves legal punishment but betraying a friend does not. So even Duff has to admit here that part of what makes murder and tax evasion deserving of punishment, but not betrayal, is that there are rules that stipulate what sorts of wrongful behavior are going to count as public wrongs. Breaking these rules involves an element of unfairness, even when the rules concern inherently wrongful behavior such as murder. This is the core claim of fair-play that [So] every crime is at least a crime of unfairness, and [but] that claim does not imply that what is fundamentally wrong with murder is merely unfairness.

### A2 FALSE EQUIVALENCE OBJECTION [2/2]

#### The false-equivalence objection assumes that fair play theory has to explain what specific penalties we should give to the exclusion of any other non-fairness-based reasons, but fair play just gives reasons *why* we punish criminals, not *how* we punish criminals.

Matt Stichter 2010. “Rescuing Fair-Play as a Justification for Punishment.” Res Publica (2010) 16:73–81. [Department of Philosophy, Washington State University]. DT.

Opponents of fair-play demand that a theory of punishment [proponents] explain (1) what all crimes have in common (such that punishment is an appropriate response) and (2) why different types of crimes should be punished differently. The claim is then made that while fair-play’s focus on fairness can provide a satisfactory answer to #1, it cannot provide a satisfactory answer to #2. But why[?] should we expect that an explanation of what crimes have in common will also be an adequate explanation of what differentiates types of crime? There doesn’t seem to be any reason why the answer to one demand should necessarily provide a satisfactory answer to the other demand, given that [O]ne demand is for similarities and the other for dissimilarities. That all crimes have a common element of unfairness, even an equal degree of unfairness, does not imply that crimes are not dissimilar in other ways relevant to assigning penalties for crime.

It’s important to note that the issue isn’t over whether fair-play theory supplies or violates the principle of proportionality in punishment, since the proportionality principle is assumed in generating the objection. If the degree of punishment should match the severity of the crime (which is the proportionality claim), and all crimes have the same severity (which is the opponent’s claim about fair-play), then all crimes deserve the same degree of punishment. The problem [is that] lies specifically with the claim that fair-play implies that all crimes have the same severity. It might seem according to fair-play theory that all crimes have the same severity given Murphy’s claim that murder is no more unfair than robbery. Opponents assume that ‘murder being no more unfair than robbery’ implies that the two crimes are equally severe from the point of view of fair-play, but Murphy clearly doesn’t mean to imply that since he goes onto claim that crimes can still be differentiated by seriousness, which would imply that factors other than fairness are taken into account when deciding on the seriousness of the crime.

Furthermore, it is not the case that Murphy was just mistaken when he thought he could consistently claim that murder was no more unfair than robbery while also claiming that crimes could still be ranked by seriousness. For all crimes have to have something in common to make it the case that punishment is a justifiable response to any type of crime, and it is that common punishable element that fair-play theory seeks to explain. Saying that all crimes involve some common element of wrongfulness does not necessarily imply that all crimes are equally wrong for the purposes of assigning penalties for committing the crimes. Fair-play theory does not require that the common element of unfairness be the only consideration taken into account when deciding on a penalty for breaking a particular law.

Obviously, there can be many different considerations that are relevant to explaining why a type of behavior was made a criminal offense, since what makes murder problematic is different from what makes tax evasion problematic. Once a type of behavior has been deemed criminal, then all citizens are expected to restrain themselves from engaging in this kind of behavior. Fair-play theory justifies punishment as a response to those who break the law, because it rectifies the inherent unfairness in refusing to restrain oneself. Although fair-play theory justifies attaching penalties to criminal behavior on the basis of fairness, deciding on the types of penalties to attach to such criminal behavior will be based on the considerations that went into criminalizing the behavior in the first place. The reasons why a behavior is problematic enough to warrant making such behavior [make it] criminal need not be the same reasons that make the criminal behavior punishable. These are separate issues that the opponent of fair-play is running together. It should also start to be apparent now how the irrelevance objection is based on this same mistake.

#### My argument is that the reasons for making something a crime aren’t the same as the reasons for punishing someone for committing the crime. For example, society can punish murderers more severely than robbers if it thinks murder is more problematic than robbery. Fair play just explains *why* some punishment is deserved for violating the law.

### A2 NOZICK’S OBJECTIONS [1/2]

#### Nozick uses incredibly trivial examples that don’t have anything to do with important parts of society like the criminal justice system. His examples are about what are called discretionary goods, i.e. those we can go without, but the criminal justice system can be thought of as *presumptive good* that anyone would consent to.

KLOSKO, George. "Presumptive Benefit, Fairness, and Political Obligation, 16Phil. & Pub." Aff 241 (1987): 246. DT.

The examples discussed by Nozick concern the provision of goods that are clearly not presumptively beneficial. We can refer to goods that are of less value-goods that may be desirable but should not be viewed as essential to people's well-being-as "discretionary" goods. Nozick's presentation of the limiting argument appears to work because there is something inherently questionable about restricting an individual's liberty in order to give him something that he could easily do without, even if the benefits of receiving such goods outweigh the burdens of helping to provide them. Accordingly, [But] if we look at similar examples, but substitute presumptive public goods [those necessary for an acceptable life for all members], we will come to different conclusions.

#### LAU furthers:

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Consider the following example. Suppose that a community is stranded on a desert island and needs to dig a well to avoid dying of thirst. It is hot, and the water table is extremely low. In order to avoid death, the members of the group have agreed to dig the well in shifts around the clock.12 Failure of any one member to do so would mean that the shift could not meet its required efforts, the entire enterprise would fail and everyone would die. In this case, it is clear that each member has an obligation to help dig the well. Prevention of death is something that we assume that a reasonable person would want, and we would want to ensure, if necessary by coercion, that other

members also did their part to help us obtain that good. As such, the well and the provision of water would be a presumptively beneficial good.

#### Given that both sides agree that the criminal justice system should exist in some form, my argument is that the principle of fairness generates obligations on people to bear benefits *and* burdens of the cooperative enterprise because it is plainly necessary for such schemes to succeed. My argument is a procedural constraint on how we design our institutions.

#### This also means that IF consent matters, the burden is still on the aff to prove people wouldn’t consent to everyone being punished for wrongdoing since I provide a system to maintain presumptive public goods…

### A2 NOZICK’S OBJECTIONS [2/2]

Klosko, George. "Presumptive Benefit, Fairness, and Political Obligation, 16Phil. & Pub." Aff 241 (1987): 246. DT.

*What is striking about Nozick's examples is that they concern the provision of goods that are of relatively little value. To some extent Nozick's choice of such examples is probably rhetorical. But I think it is more than that. If we were to substitute examples of schemes providing more significant benefits, the force of Nozick's arguments would be [are] blunted.*

*The principle of fairness is able to generate obligations to contribute to nonexcludable schemes [for] if certain conditions are met. The main conditions are that the goods in question must be (i) worth the recipients' effort in providing them and (ii) "presumptivelybeneficial."'9 The implications of (i) will be discussed below. As for (ii), by "presumptively beneficial" goods (or presumptive goods) I mean something similar to Rawls's primary goods, "things that every man is presumed to want."20 Since we are concerned with public goods, we can confine our attention to presumptively beneficial public goods (presumptive public goods). These are public analogues of Rawls's primary goods. Basically, such goods must be [those] necessary for an acceptable life for all members of the community. To apply Rawls's description of primary goods, presumptive public goods are things it is supposed that all members of the community want, whatever else they want, regardless of what their rational plans are in detail.21*

*The notion of presumptive public goods is still undoubtedly unclear in various respects. But we need not attempt to explicate the precise con- tents of this class. Certain goods can be named that can be presumed to be necessary for an acceptable life for all members of the community. Though the number of these goods is perhaps small, such things as physical security, protection from a hostile environment, and the satisfaction of basic bodily needs appear obviously to fit the bill. For our purposes, it is not necessary to extend the list into more controversial areas. Providing presumptive public goods such as these is widely recognized as a central purpose of government.22*

*The principle of fairness applies more readily to the provision of presumptive public goods than to the provision of public goods in general. As we have noted, there is a strong presumption that individuals should decide for themselves whether they are going to be required to make sacrifices. The cooperative schemes on which we will concentrate provide public goods that are indispensable to the welfare of the community. In these cases the indispensability of the goods overrides the outsider's usual right to choose whether he wishes to cooperate.23*

### A2 SOME PEOPLE BEAR MORE BURDENS

#### The principle of fairness just requires burdens be part of a cooperative scheme, not that they be the same.

Klosko, George. "Presumptive Benefit, Fairness, and Political Obligation, 16Phil. & Pub." Aff 241 (1987): 246. DT.

In all three examples, the goods in question satisfy both conditions (i) and (ii) above. They are (i) worth their costs to their recipients as well as (ii) presumptively beneficial. In regard to condition (i), the benefits and burdens under consideration are those of the relevant community as a whole, rather than of each particularmember.29Many important cooperative schemes involve complex forms of cooperation, in which the burdens borne by different individuals may differ appreciably. The principle of fairness requires not that the burdens people bear be identical, but, in Lyons's words, only that they be "associated as integrated elements in a co-operative scheme."30 In an army, to take an obvious example, those individuals who are killed or severely wounded in action bear heavier burdens than other soldiers, some of whom may have relatively pleasant duties. But this in itself would not free the former from their obligation to serve, as long as there were good grounds for assigning both groups their tasks and the assignments were fair.31